

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)	
)	
LONDON DIGITAL LIMITED,)	CASE NO. 05-63360 JPK
)	Chapter 304
Debtor.)	
*****)	
DAVID PAUL HUDSON and)	
LOUISE BAXTER, As Joint)	
Administrators of London Digital)	
Limited,)	
)	
Plaintiffs,)	
)	
v.)	ADVERSARY NO. 05-6099
)	
FOCOS ELECTRONICS S.L., and)	
NATIONWIDE CALL COMPANY,)	
INC.,)	
)	
Defendants.)	

ORDER

On June 30, 2005, a hearing was held on the plaintiffs' Emergency Motion for Temporary Restraining Order, Request for Hearing on Preliminary Injunction, and for Expedited Discovery. The plaintiffs appear by counsel Catherine Steege and by counsel Sheila Ramacci. No appearances have been entered in this adversary proceeding on behalf of either of the defendants, and no appearance was made at the hearing on either of their behalves.

This adversary proceeding was initiated by a two (2) count complaint filed on June 22, 2005. Count I of the complaint, although styled as an "Action for Turnover", was acknowledged by Attorney Steege at the hearing to be an action to determine and recover payment with respect to account receivables alleged to be owed the plaintiffs by each of the defendants. The second count of the complaint seeks an injunction, and it was in furtherance of this second count that the Emergency Motion was filed in order to seek to obtain a temporary restraining order.

The record provides evidence that the plaintiffs complied with the provisions of Rule 65(b)(2) with respect to provision of notice of hearing to the defendants. With respect to the factual merits of the plaintiffs' request that a temporary restraining order be issued, the hearing focused on the requirements of Fed.R.Bankr.P. 7065/Fed.R.Civ.P. 65(b)(1), which require that the plaintiffs establish "from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition". The sole evidence with respect to this requirement is provided by paragraphs 18, 19 and 20 of Count II of the adversary complaint [which is verified as required by the rule]. The statements in those paragraphs are made on "information and belief". Paragraph 18 states "Focos and Nationwide may have assets in the United States and they may be removing or about to remove such property so that London Digital may not be paid". Paragraph 19 states "Focos and Nationwide may have disposed of property subject to execution with an intent to hinder, delay or defraud creditors". Paragraph 20 states a conclusory allegation that the plaintiffs "would suffer irreparable harm if the Court does not enjoin the transfer of the assets of Focos and Nationwide". As stated at the hearing, the Court does not deem these allegations to be a sufficient factual evidentiary foundation for the issuance of a temporary injunction; see, *Fort Wayne Women's Health Organization v. Brane*, 734 F.Supp. 849 (N.D.Ind. 1990); *Menon v. Utica Estates Company*, 987 WL 6432 (S.D.N.Y. 1987) ["(an) allegation, made on information and belief only, fails to meet the standard of rule 65(b). It does not clearly establish that immediate and irreparable injury will occur at all, let alone that such injury will occur before opposing counsel can be heard." 987 WL at *1.]. No foundation has been established as to anything other than speculation that either or both of the defendants may have some form of property in the United States, the transfer of which might give rise to harm to the plaintiffs. It is the plaintiffs' burden to establish a factual premise for the harm allegedly to be suffered: absent some concrete demonstration of at least the potential for

the existence of assets within the Court's territorial jurisdiction, the best that can be said is that an injunction issued to prohibit transfer of assets – if none existed – would not in any manner prejudice the defendants. Based upon this record, the best the Court could do would be to issue this type of "no harm, no foul" order, which is not in consonance with the burdens required by applicable law with respect to the issuance of the extraordinary remedy of an injunction.

At the hearing, the Court raised a number of issues concerning the underlying action in which this adversary proceeding was filed, a requested ancillary administration pursuant to the provisions of 11 U.S.C. § 304. The record establishes that service of the summons and application for the ancillary proceeding was served on June 23, 2005, and thus that the 20-day period provided for response to that application has yet to run. The response deadline with respect to this adversary proceeding is, of course, 30 days from the date of issuance of the summons, and thus if the defendants are to appear and respond to the ancillary administration application and/or the adversary complaint, they must do so in the relatively near future.

The Emergency Motion includes a request for expedited discovery, which the Court finds should be granted. By operation of Fed.R.Bankr.P. 7026/Fed.R.Civ.P. 26(a)(1)(E)(vii), the ancillary proceeding initiated by the plaintiffs' application is excepted from the initial disclosure requirements of Fed.R.Civ.P. 26(a)(1), and pursuant to Fed.R.Civ.P. 26(d), is exempted from the discovery initiation requirements of that rule. To the extent the plaintiffs' discovery is deemed submitted in this adversary proceeding, the Court by this order waives the restriction on commencement of discovery under Rule 26(d) with respect to written discovery requests served within 5 calendar days of the entry of this order. In light of the potential for dissipation of property, the Court finds that any discovery response period should be shortened, and that thus, any period for response to written discovery provided by the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure with respect to written discovery which may be undertaken by the plaintiffs should be shortened.

The Court further finds that a preliminary injunction hearing should be scheduled with relative promptness, and that because the plaintiffs reside in England, Focos Electronics is a corporation incorporated under the laws of Spain, and Nationwide Call Company, Inc. is a Texas corporation, the provisions of Fed.R.Bankr.P. 9017/Fed.R.Civ.P. 43(e) will be applied at the preliminary injunction hearing, thus allowing evidence to be submitted in the form of affidavits.

IT IS ORDERED that the plaintiffs' request for a temporary restraining order is denied.

IT IS FURTHER ORDERED that a preliminary injunction hearing will be held on **August 5, 2005 at 10:00 a.m.** The Court has reserved two hours for this hearing.

IT IS FURTHER ORDERED that the plaintiffs may immediately undertake discovery, including written discovery, and that with respect to written discovery served within 5 calendar days of the date of entry of this order, any deadline for response to such written discovery provided by applicable rules is shortened to 15 days from the date of service of discovery to the extent that service is made by electronic means or by telefax [which forms of service are hereby approved], and to 20 days from the date of service if service is made by mail.

IT IS FURTHER ORDERED that the provisions of Fed.R.Civ.P. 43(e) shall apply to the manner of submission of evidence at the preliminary injunction hearing, and that such evidence may be submitted by any party in the form of an affidavit.

Dated at Hammond, Indiana on July 1, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

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